IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1281 of 2004

Naresh K. Gupta, Ex-Chief)
Engineer (Construction and)
Survey) Western Railway)
Head Quarters Office,Churchgate)
Mumbai-400 020)..PETITIONER

Versus

1.The Union of India, through)
the General Manager, Western)
Railway, Headquarters Office)
Churchgate, Mumbai-400 020.)..RESPONDENTS
2.The Secretary, Railway Board)
Ministry of Railways, Rail)
Bhavan, New Delhi-110 011)

Mr.J.P. Cama, Senior Counsel i/b. G.S. Walia and R.G. Walia for the Petitioner
Mr. Suresh Kumar, for the Respondents

CORAM : F.I. REBELLO & S.P. KUKDAY,JJ.

DATED : 16th March,2005

JUDGMENT (PER F.I. REBELLO, J.)

. The petitioner by the present petition impugns the

order dated 1st April, 2003 in O.A. No.228 of 2003. By the impugned order the learned Tribunal refused to interfere with the transfer order vide letter dated 20th September, 2003. While dismissing the O.A. the learned Tribunal relied on the appointment order and also the Rules to hold that the petitioner, a Group A Officer has All India transfer liability. It further held that the transfer could only be interfered with, if it was vitiated by malafides or contrary to Rules. In the instant case it found that the transfer was an administrative transfer and the petitioner was holding transferable job. His representation made to the Railway Board for cancellation of transfer was also rejected. It also noted that the petitioner was found medically fit by the Doctor with effect from 1st January, 2003. In that light of the matter dismissed the Original Application.

2. At the hearing of this petition on behalf of the petitioner learned Counsel submits that the matter was placed on board for admission. The Tribunal, therefore, could not have dismissed the Original Application even without getting a say of the respondents considering the averments in the Original Application. It is then submitted that no reasons have been disclosed for transferring the petitioner and as such the order is vitiated. The order, it is contended, was not for administrative exigencies and that being the case also the order is liable to be set aside. Reliance is placed on several judgments, which to the extent necessary, will be adverted to.

3. On the other hand on behalf of the respondents their learned Counsel contends that the letter of appointment itself 28/29-12-1991 had the following condition as Condition No.3:-

> "You have been posted to the Western Railway. You will ordinarily be employed throughout your service on the Railway to which you are posted. The Railway Board,however, reserve the right to require you to serve in any other Railway or Project in or out of India. You will, however, receive your training on the Northern Railway. ON completion of your training, you will go to the Western Railway to which Railway you have been posted."

It is pointed out that the petitioner earlier in O.A. No.723 of 2000 had challenged his transfer as Divisional Railway Manager, Lumding, North Frontier Railway vide letter dated 5-5-2000. The Tribunal noted that Rule 226 of the Indian Railway Establishment Code which are Rules issued under Article 309 of the Constitution of India, provided that the Railway Servant shall be employed throughout his service on the railway or railway establishment to which he is posted on first appointment and shall have no claim as of right for transfer to another railway or another establishment. In the exigencies of service, however, it shall be open to the President to transfer the railway servant to any other department or railway or railway

establishment including a project in or out of India. The learned Tribunal by the order dated 12th April, 2001 had held that the right of posting is reserved in the Railway Board and as such the transfer of the petitioner from Mumbai to Lumding was in accordance with the policy of the Railway Board and also in accordance with the Rules. The O.A. was accordingly dismissed. The petitioner herein aggrieved by that order preferred Writ Petition No.2388 of 2001. A learned Bench of this Court by order dated 16th October, 2002 dismissed the petition.

. It is submitted that there was exigency to transfer the petitioner. Reliance is also placed on various judgments amongst others to contend that the Courts in the matter of transfer when the career prospects remain unaffected and there is no detriment to the government servant interference by courts should be rare and only when a judicially manageable and permissible ground is made out. For that purpose reliance is placed in the judgment of **N.K. Singh v. Union of India & Ors., (1994) 6 SCC 98.** It is also pointed out that the Courts or Tribunals are not appellate forums to decide the administrative grounds. The sole exception being if they are vitiated either by malafides or by extraneous considerations without any factual background foundation. Reliance is placed in the judgment in the case of **State of M.P. and Another v. S.S. Kourav & Ors., (1995) 3 SCC 270.** Similarly reliance is placed on the judgment in the case of **State of U.P. and Another V. Siya Ram & Anr., (2004) 7 SCC 405** to contend

that unless an order of transfer is shown to be an outcome of mala fide exercise or stated to be in violation of statutory provisions prohibiting any such transfer, the Courts or the tribunals normally cannot interfere with such orders as a matter of routine, as though they were appellate authorities substituting their own decision for that of the employer/management, passed in the interest of administrative exigencies of the service concerned. It is, therefore, submitted that this Court ought not to interfere with the order of transfer.

3. Considering the above, the question is whether this Court now should interfere with the order of transfer. The order of transfer is of the year 2002. The petition was filed on 12th December, 2004 and has been heard today.

4. The order of transfer dated 20th March,, 2002 as set out in the letter has the approval of the President of India. By that order the petitioner is transferred in the same capacity to South Eastern Railway. In respect of the earlier order of CAT in the matter of transfer, the contention of the petitioner was that he could not be transferred, was rejected on the ground that both under the Rules and the appointment order there was a provision for transfer. That judgment of CAT was challenged before this Court and the petition field was dismissed. It was thus open to the learned Tribunal considering its earlier order to have dismissed the O.A., even at the admission stage. It is not as if, every matter which is filed requires notice.

That depends on the facts of each case. The petitioner himself had reproduced Rule 226. His ground was that there is no public interest, there being no exigency of service.

. There are no allegations of personal malafides. It is, however, submitted that this is a case of legal malafides and as such this Court can invoke its extra ordinary jurisdiction. For the submission that when there are serious allegations the O.A. ought not to have been dismissed reliance is placed on the judgment in the case of **D.D. Suri v. A.K. Barren & Ors., AIR 1971 SC 175.** In that case there were serious allegations including of improper motive and mala fides made against other senior officers and State Government. It is in these circumstances that the Apex Court held that the petition ought not to have been dismissed in limine. The judgment in **Naseem Bano (Smt) vs. State of U.P. and Ors., 1994 SCC (L & S) 31** , is for the contention that as there was no denial to the averments the High Court should have proceeded on the basis that the said averments had been admitted by the Respondents. In Ramadhar Pandey vs. State of U.P. & Ors., 1993 Supp. (3) SCC 35 the Appellant before Apex Court was transferred to ex-cadre post. The Apex Court therein held that on examination of the records there, that there was no material to indicate from the records or the counter affidavit that the transfer was in public interest. The Court held that though the transfer is a necessary concomitance of every service, but if such a transfer could be effected only on certain conditions, it is necessary to adhere to those

conditions. In **Raj Bahadur Sharma (Dead) through LRs. vs. Union of India & Ors., 1998 SCC (L & S) 1217,** on the facts of that case the Apex Court held that in the absence of denial of specific averments, an inference must be drawn that the statement of fact pleaded by the opposite party ought to be accepted. **Mohinder Singh Gill & Anr. vs. The Chief Election Commissioner, New Delhi & Ors., AIR 1978 SC 851** is an authority for the proposition that it is not open to an authority to support his order by additional grounds. The order has to be supported on the basis of the record. In other words an order cannot be supported by giving fresh reasons. In **K.B. Shukla & Ors. v. Union of India & Ors., AIR 1979 SC 1136** the Apex Court was considering the issue of exigencies of service. The Apex Court noted that the formation of opinion in the matter in veiw of the peculiar nature of the function and the language of the provision, has primarily been left to the subjective satisfaction of the Government. The Court further observed that indeed, it is as it ought to be. The responsibility for good administration is that of the Government.. The maintenance of an efficient, honest and experienced administrative service is a must for the due discharge of that responsibility. Therefore, the Government alone is best suited to judge as to the existence of exigencies of such a service, requiring appointments by transfer. The term 'exigency' being understood in its widest and pragmatic sense as a rule, the court would not judge the propriety or sufficiency of such opinion by objective standards, save where the subjective process of forming it, is vitiated by

mala fides, dishonesty, extraneous purposes, or transgression of the limits circumscribed by the legislation.

5. If the facts of the present case are considered it would be clear that the letter of appointment and the Rules themselves provide for transfer. Under Rule 226, it is provided that in exigency of service it shall be open to the President to transfer the railway servant to any other Department or railway or railway establishment. Thus considering exigency of service and also in terms of condition No.3 of the letter of appointment it was open to the respondents to have transferred the petitioner. The order of transfer notes that this is done with the approval of the President of India. Once that be the case, in the absence of showing malafides and in our opinion neither personal malafides have been proved or established, nor legal malafides have been established this would not be a fit case for this Court to interfere with the impugned order in the exercise of its extra ordinary jurisdiction.

. It may be noted that the petitioner has been resisting his transfer on various grounds. It is no doubt true that it is always open to a party if aggrieved to challenge a wrong order. Though it was sought to be made out by the petitioner that his promotional avenues will be affected, on behalf of the Respondents learned Counsel makes a statement that even if the petitioner is transferred as and when promotions become available the petitioner will be

considered for such promotions.

6. In the light of that the petition stands dismissed.

No order as to costs.

(F.I. REBELLO, J.)

(S.P. KUKDAY, J.)